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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 581

JAMES W. MILLER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Preliminary Statement

(1)

The main purpose of this reply brief is to call the court's attention to the fundamental inconsistency between the position taken by the Solicitor General in his brief in this case, as to the *Jencks* case issue, as contrasted with the position taken by him on the identical issue in two cases at this same Term in which, on the basis of *Jencks*, he confessed reversible error (*Scales* v. *United States* and *Lightfoot* v. *United States,* which were respectively Nos. 3 and 4 at the October 1957 Term). Partly, if not solely, on the basis of the Solicitor General's concession of error, this court remanded *Scales* and *Lightfoot* to the District Court for a new trial (*Scales* v. *United States* and *Lightfoot* v. *United States,* 354 U. S. —, October 8, 1957; see, post p. 4 for full text of decisions).

(2)

A subsidiary purpose of this reply is to call attention to several basic fallacies in the arguments advanced in opposition to the granting of the petition herein.

ARGUMENT

POINT ONE

The Solicitor General's Confession of Error in the *Scales* and *Lightfoot* cases is inconsistent with his position taken in the instant case and, at all events, the decisions in those cases, as well as in *Jencks*, require that this case be remanded for a new trial.

(1)

In his brief in opposition in the instant case (Government's Brief, p. 17), the Solicitor General attempts to meet the issue of the *Jencks* decision, as advanced by the petitioner (Pet. pp. 25-29), on two grounds, viz., (1) that the *Jencks* case is inapposite because in it the trial judge refused to examine the prior statement of the witness whereas here, he did, and (2) at all events, the trial judge's refusal to turn over the relevant portions of the prior statement to the defense in this case was merely "harmless" error (Government's Brief, p. 17).

We shall meet the foregoing two opposition arguments head-on hereafter (post pp. 5-14). First, however, we want to point out and document the

proposition that the Solicitor General's position on the *Jencks* case issue in this case is diametrically opposed to the position taken by him on the same issue in the *Scales* and *Lightfoot* cases recently (October 8, 1957) passed upon by this court.

The cases of *Junius Irving Scales* v. *United States* and *Claude Mack Lightfoot* v. *United States,* were originally Numbers 29 and 32 on the October 1956 Term of this court. The Court of Appeals decisions in the respective cases were reported below: *Scales,* 227 F. 2d 581, C. C. A. 4th; *Lightfoot,* 228 F. 2d 861, C. C. A. 7th. This court granted certiorari in both cases the same day and the decisions are reported at the same page of the report (350 U. S. 992). By an order made June 3, 1957, re-argument in both cases was ordered (353 U. S. 979). Thereafter the cases were designated as Nos. 3 and 4 on the docket for the October 1957 Term.

On the re-argument, the Solicitor General submitted a brief, entitled in both cases, and dated September 1957 and styled "Supplemental Memorandum for the United States on Reargument". In the opening paragraph of that brief the Solicitor General *confessed error* in *both* cases based upon this court's decision in *Jencks* and he conceded that new trials had to be granted in both cases. We quote the exact language of the Solicitor General's confession of error from the opening paragraph of his supplemental memorandum:

> "A. Each of these cases involves, inter alia, substantially the same production-of-documents issue which was raised and decided in *Jencks* v. *United States,* 353 U. S. 657. See Brief for the

United States in *Scales*, No. 29, Oct. Term 1956, pp. 74-77; Brief for the United States in *Lightfoot*, No. 32, Oct. Term, 1956, pp. 38-40. Each case, accordingly, must be reversed for further proceedings in the light of the *Jencks* decision. On the retrial, if the same witnesses are called by the Government and demand is made for production of their written statements to the F. B. I., the procedure will presumably be that directed by new Section 3500 of Title 18 of the United States Code, as added by Public Law 85–269, 85th Cong., 1st Sess., approved on September 2, 1957."

On October 8, 1957 this court, based partly upon the concession of error thus made, and partly upon a consideration of the entire record in each case, reversed both cases and remanded them for new trials. The full text of this court's decision in *Scales* reads as follows (and the decision in *Lightfoot* is in the same language):

"*Scales* v. *United States*—October 8, 1957 Per Curiam: Upon consideration of the entire record and the confession of error by the Solicitor General, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed. Jencks v. United States, 353 U. S. 657".

Petitioner proposes to demonstrate that the Solicitor General's concession of error in the *Scales* and *Lightfoot* cases is wholly inconsistent with his position in the instant case. It will also be argued that this court's decisions in those two cases are binding "precedents" which should, in addition to *Jencks*, mandate not only granting certiorari herein, but an ultimate direction of a new trial of the instant case.

Indeed, as we see it, the decision of the court below so clearly violates Jencks, that not only should certiorari be granted, but by an appropriate simultaneous miscellaneous order, a direction for a new trial should me made, without the necessity of the case being added to this court's docket and further briefed and argued.

Factually, the production-of-documents issue was raised in the *Scales* case, in the identical way in which it was presented in the instant case. The Court of Appeals decision in the *Scales* case is reported at 227 F. 2nd 581 and a reading of the opinion therein discloses exactly the manner in which the issue was raised there. On the argument in the Court of Appeals, the defendant claimed it was reversible error for the trial judge to refuse to turn over to defense counsel F. B. I. reports and prior written statements made by two government witnesses identified by names as Clontz and Childs. The trial judge had examined the statements and, after such examination, reached the conclusion that there was nothing in them which was contradictory of the witnesses' testimony and, therefore, declined to make them available to the defense counsel. This is exactly what occurred in the instant case with respect to the Mishel "master" statement, except that here, the trial judge's conclusion was that there was no "material inconsistency", rather than the flat finding of "nothing contradictory" as was made by the trial judge in *Scales* because, in our case, there is a finding of at least *some* inconsistency. (See, Petition pp. 22, 25-29). If anything, therefore, this is a stronger case for the production of the documents than was *Scales*. That we have correctly recited the factual setting under which the issue was raised in *Scales* is indicated by the quotation of a single sentence

of the Court of Appeals opinion in *Scales* in which it was said (227 F. 2nd 581, 592):

> "As to the F. B. I. reports on the statements of Clontz and Childs, there was no suggestion that they contained anything contradictory of testimony given by these witnesses on the trial, *and the trial judge, who examined the statements, held that there was nothing in them contradictory of that testimony*" (emphasis added).

The printed transcript of the record in the *Scales* case also serves to document our assertion that, in that case, the trial judge examined the statements *in camera* and concluded that they were not contradictory (See, Record in *Scales*, p. 96; also, petitioner's brief in *Scales* in this court, dated August 24, 1956, pp. 43, 44).

If a "confession of error" was justified in *Scales*, therefore, it was equally warranted in the instant case—because, in this case, the identical issue was presented in exactly the same way. Factually, the two cases on the issue in question are as indistinguishable as two peas in a pod.

In frankly confessing error in the *Scales* and *Lightfoot* cases on the basis of *Jencks*, we believe the Solicitor General was not only right, but that his commendable candor is entitled to some professional accolade. His action there was in accordance with the best traditions of the bar. As this court on one occasion said of a similar confession of error (*Young v. United States*, 315 U. S. 257, 258):

> "The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent".

The concessions of error made in *Scales* and *Lightfoot* were undoubtedly made by him in entire good faith and in accordance with what he considered to be his duty as a responsible public official.

But why the Solicitor General, out of the same sense of duty, failed to make the same concession of error in the factually identical instant case, remains a complete mystery. Instead, in his brief in opposition here (Government's brief, p. 17), he takes the completely inconsistent and untenable position that the *Jencks* case is not controlling because in *Jencks,* the trial judge did not examine the prior statements, whereas in the instant case, the judge did examine them. The alleged distinction is merely a verbal *tour de force.* Strangely enough, the Solicitor General omits from his brief in opposition *any* reference to *Scales* or *Lightfoot.* As already pointed out, the issue was presented in *Scales* in exactly the same way as it was here. In *both* cases (*Scales* and the instant one), the trial judges examined the statements and in *both* cases they concluded that there was no inconsistency or contradiction between the statements and the testimony. If this was admittedly error in *Scales,* and we agree that it was, then the same admission is called for here. And there is further inconsistency in the Solicitor General's present argument (Government's brief in opposition, p. 17) that the factual difference between *Jencks* and the instant case has significance. His confessions in the two cases (*Scales* and *Lightfoot*) that both, despite the same factual differences between them, were governed by *Jencks* cannot be reconciled with his present argument. Actually, of course, there is no substance whatever to the alleged distinction. It is merely a distinction without a difference. The gravamen of the *Jencks*

case is that a defendant in a criminal case is entitled to have delivered to him for his inspection prior statements of a witness against him, once it is established that such statements relate to the testimony of the witness (353 U. S. 657, 669). Indeed, in its opinion this court pointed out (p. 669):

> "The practice of producing government documents to the trial judge for his determination of relevancy and materiality . . . is disapproved."

Thus, as we read *Jencks*, it is utterly and completely immaterial whether or not the trial judge examined the statements or made any determination as to whether or not they should be turned over to the defendant. Until inspection by the defense, the trial judge has no role to play. The essence of *Jencks* is that, once a proper foundation is laid, the prior statements must be delivered to the defense for its inspection. Unless that is done, reversible error is committed.

The fundamental inconsistency of making confessions of error, on the basis of *Jencks,* in the *Scales* and *Lightfoot* cases, and in failing to do the same thing in the factually identical instant case, is so flagrantly incongruous that we believe that the Solicitor General owes this court, and the petitioner, a full and complete explanation of his illogical conduct. Should he decline to make such an explanation voluntarily, an appropriate order of this court should be made requiring it. On the one hand, if he erred in confessing error in *Scales* and *Lightfoot,* then he should now frankly confess his own error. On the other hand, if he now recognizes that a confession of error should also have been made in the instant case,

that fact, too, should be candidly conceded. Of course, if he feels that his diverse positions are actually reconcilable, then he ought to be permitted to explain how, logically, they can be harmonized. But, at all events, some explanation is called for.

This court, on numerous occasions, has considered the effect of a "confession of error" and its significance. While it is generally recognized that such a confession is to be given considerable weight, nevertheless such a stipulation does not relieve this court of its duty to examine independently the errors confessed (*Young* v. *United States,* 315 U. S. 257, 258, 259, 1941). And on some occasions this court has not felt bound by the confession (See cases cited in *Casey* v. *United States,* 343 U. S. 808, 810). The settled practice in this court at the present time, in the rare cases where confessions of error are made, is to be extremely "careful to note that our [this court's] reversal of a court of appeals judgment is based upon consideration of the record, not blind acceptance of a confession of error" (*Casey* v. *United States,* 343 U. S. 808, 810). Consistent with this now well established practice, this court in its decisions of reversal in the *Scales* and *Lightfoot* cases, was careful to note that the decisions of reversal were made "Upon consideration of the entire record and the confession of error" (See *Scales* decision, ante, p. 4).

The prevailing practice of reviewing the entire record in confession of error cases, make the decisions rendered thereon, *stare decisis,* though partly based on the confessions of error. As once said in such a case ". . . our judgments [in confession of error

cases] are precedents . . ." (*Young* v. *United States*, 315 U. S. 257, 259).

Thus, it can be authoritatively said that this court's decisions in *Scales* and *Lightfoot* are as much "precedents" in this case as is *Jencks*. Under the authority of all three cases, certiorari should be granted herein.

(3)

Two Court of Appeals cases decided since *Jencks* afford additional authority for the proposition that reversible error was committed in denying the defense the right to inspect the prior statements of the government witnesses Mishel and Sershen. These cases are *United States* v. *Rosenberg*, 245 F. 2d 870 (3rd Cir. 1957) and *United States* v. *Killian*, 246 F. 2d 77 (7th Cir. 1957). In *Rosenberg*, the trial judge *in camera* inspected the grand jury testimony and a prior statement of a government witness given to the F. B. I., and while he (the trial judge) orally indicated to defense counsel the discrepancies between the grand jury testimony, and the written statements as against the trial testimony, he refused to turn them over to the defense. The Court of Appeals held this to be such reversible error under *Jencks* that it "compels us [the court] to grant a new trial" (245 F. 2d 870, 871). In the *Killian* case the trial judge refused to compel the production of a prior written report of a government witness covering the subject-matter of his testimony. On appeal to the Court of Appeals this was claimed to be reversible error. The original decision of the Court of Appeals was rendered on June 10, 1957, exactly one week after *Jencks* was decided. On the original decision the court affirmed, holding that the

trial judge had not abused his discretion in refusing to compel the production of the statement. The defendant, however, filed a petition for rehearing based on *Jencks*, which is exactly the same procedure followed by the defendant here. Unlike the Second Circuit's decision on rehearing in the instant case (See Appendix to Petition, App. 1-App. 5), the Seventh Circuit in the *Killian* case unanimously reversed itself and ordered a new trial on the basis of *Jencks*. Its decision on the rehearing is appended to the original contrary decision and is reported at 246 F. 2d 82.

(4)

In a further effort to defeat the application of the *Jencks* case, the Solicitor General seeks to argue that the denial of the inspection of the prior reports of government witnesses was mere "harmless" error and cites his own argument in *Sheba Bracelets* v. *United States* as his authority (Government's brief, p. 11). The same argument, based on the same case, was advanced in the Court of Appeals, but even that court failed to place any reliance on *Sheba* or to give the question, as presented in this case, the "harmless error" treatment (App. 1-App. 5). Actually, the *Sheba* case is so far afield of the instant one that we need not labor the point that it is inapposite. We fully argued the point in the Court of Appeals (See, Defendant's reply brief below on petition for rehearing, pp. 93a-98a).

The instant case simply will not lend itself to the "harmless error" treatment. The Mishel testimony was too vital to the government's case. Here, the three letters upon which the indictment was founded had their genesis in the sale of government bonds.

Only three persons were present when the sale took place, viz., Mishel, Rosenberg and the defendant Miller. Only Mishel and Miller testified at the trial regarding the full transaction and their testimony was diametrically opposed (Petition, pp. 19-21). Thus, Mishel was, in every sense of the word, a "crucial" government witness upon whom its case depended. The Court of Appeals (App. 2) characterized him as "An important witness for the prosecution . . .". This court has observed that where "the Government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny" (*Gordon* v. *United States,* 344 U. S. 414, 417). This case, indeed, was such a case and because of this fact the production and inspection of the fifty-page "master" statement of Mishel was vital to the defendant's case. In refusing to permit an inspection, the trial judge based his refusal upon his own finding that it contained "no *material* inconsistency that would be worthy of our attention" (369a). The two qualifications interpolated by the trial judge i. e. the materiality and worthiness of the inconsistencies, definitely indicates that there were, concededly, "inconsistencies" between the statement and the testimony.

In deciding the *Jencks* case, this court pointed out that the defense and not the trial judge is best equipped to determine the impeachment value of a prior statement and it added (353 U. S. 657, 668, 669):

> "Because *only the defense* is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must

> initially be entitled to see them to determine what use may be made of them. Justice requires no less."

And this court, earlier in its opinion, had indicated that there were many factors, other than flat contradiction, to be considered in arriving at the impeachment value of such a statement. On this subject, this court said (353 U. S. 657, 667):

> "Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony".

What criteria was used by Judge Walsh in arriving at his conclusions as to the "materiality" or the "worthiness" of the inconsistencies between the Mishel "master" statement and the testimony we do not know (369a). Mishel himself, however, when asked whether everything covered by his testimony was included in the "master" statement, answered (230a):

> "There could be some isn't, some is; I don't know".

And he freely admitted making many other additional statements which added many facts not embraced in the "master" statement (207a, 208a). Although the defense demanded all such prior statements (246a) none but the "master" and the state-

ment of February 28, 1955 were produced—and no inspection of the "master" was permitted. Nor was any use of the other allowed (Petition, pp. 22-24).

On such a record, we fail to see how the Government can seriously argue that such errors were "harmless". What is, and what is not, "harmless error" may, in some cases, be difficult to decide (Cf. *Kotteakos* v. *United States,* 328 U. S. 750, 764, 765). But there is no basis for hesitancy here. Indeed, the same harmless error argument was advanced by the Government and rejected by this court in *Gordon* v. *United States,* 344 U. S. 414 (1952), although it had been adopted by the court below in that case (196 F. 2d 886, 889). In that case, this court unanimously held that it was reversible error for the trial court to refuse to order the government to produce a prior statement of one of its key witnesses who had admitted that such prior statement was contradictory of his trial testimony. In support of its harmless error argument, the government contended that since the defendant had, on cross-examination of the witness in question, elicited an admission that his statement was contradictory of his testimony, the defendant had obtained the same impeachment value from the admission as he would obtain from the production of the statement itself. Thus, so it argued, the failure to require the production of the statement was merely "harmless error". This court summarily and unanimously rejected that argument and held that the error in failing to require the physical production of the statement was reversible and substantial error. In so doing it emphasized the

importance of the witness to the government's case and pointed out (344 U. S. 414, 421):

> "Except the testimony of this witness be believed, this conviction probably could not have been had".

We insist that the Mishel testimony in the instant case was of equivalent importance to the government in the instant case as was the testimony of the witness involved in *Gordon*. In this case, as was true of the witness' testimony in *Gordon*, unless Mishel's testimony be believed, this conviction probably could not have been had. For that reason, the failure to permit defense counsel in the instant case to either inspect the Mishel "master" statement, or to make any use before the jury of his other statement, was substantial and reversible error.

(5)

In dealing with the prior statement of the witness Sershen, the government in its brief in opposition (pp. 17, 18) makes a factual statement quite contrary to the record. At page 18 the flat statement is made that "no request was ever made for its (Sershen's additional report) production". This categorical statement by the Solicitor General must have been made inadvertently—because it is directly contrary to the record. At pages 246a and 247a of the record, the defense counsel applied for (1) the prior statements of the witness Mishel (2) the statements in the possession of the F. B. I. and (3) those of the Secret Service. The request for the Secret Service reports is recorded in the third and fourth lines of page 247a of the record. The Solicitor General to

the contrary notwithstanding (Government's Brief, p. 18), there is, therefore, definite merit under *Jencks* for the point that the failure to order the production, or to permit an inspection of the "additional" Sershen report, was reversible error, wholly aside from the issue of the Mishel statements.

POINT TWO

The record adequately raises the question of whether the evidence is sufficient to sustain the indictment.

The broad basis upon which the defense moved at the close of the government's case (479a-484a) and at the end of the entire case (802a, 803a) for judgment of acquittal, was certainly adequate to pose the question of whether the writing of the three innocuous letters upon which the indictment is based constituted indictable offenses under the statute here involved. The Solicitor General in his opposition brief (Government's brief, p. 12) states that this question is being raised for the first time in this court. We do not, of course, agree. But even assuming, *arguendo*, this to be true, that does not preclude this court from considering the question—because it is always open. Assuming that the defendant had been convicted under the same statute for writing three "mash" notes to a government Secretary and his counsel had not argued, until the case got to this court, the question of the sufficiency of the evidence under the indictment, would this court be foreclosed from considering the question? The answer is obvious.

We do not feel that the government's brief in opposition (pp. 12, 13), in any degree, meets the contentions posed under petitioner's question two (Petition, pp. 30-32). Not a single case is cited by the government—nor even an analogy made under decided cases—for the proposition that writing letters such as those here involved, in which a person gives a government agency his own version of a business transaction, can constitute the grave crime of violation of 18 U. S. C. §1001, where admittedly no conceivable injury to the government results therefrom. No attempt whatever is made to show that the statements made in any of the letters were of a "material fact" or that any of them "defrauded" or deceived the government or any of its agents or departments, or had any tendency to do so.

POINT THREE

The question of the propriety of the cross-examination is unanswered by the Government's brief.

(1)

As a preliminary to our discussion of the cross-examination issue, we want to take sharp issue with the Solicitor General's statement at the bottom of page 20 of his brief. There he makes the following statement:

> "There is no suggestion that government counsel did not have reason to believe that the events asked about [on cross examination] had happened and that truthful answers would have confirmed their existence".

We do not know what the Solicitor General's definition of a "suggestion" is—but apparently it does not accord with ours. In the petition (p. 33), we recapitulated all the improper questions which were asked on cross examination by the prosecutor. We then said (beginning at bottom of p. 33 and ending, p. 34):

> "There was not a scintilla of evidence in the case of any of the acts of misconduct which were insinuated by the foregoing questions".

That is a direct assertion and not a mere "suggestion" of the complete lack of any basis for asking any of the questions. And we stand on the statement. We go further. We reiterate that government counsel had no valid reason to believe that any of his insinuating questions would elicit an affirmative answer. His oblique implication in the statement quoted from the government's brief, supra, that truthful answers to the questions would have confirmed the matters covered by the interrogation is completely gratuitous, unfounded and unsupported.

(2)

The issue posed by petitioner's question three (petition, pp. 32-39) as to the impropriety of the line of cross-examination to which the petitioner was subjected, is neither adequately nor partially answered by the government's brief. In the petition we cited fourteen cases from all the circuits which, with impressive unanimity, establish the proposition that the government, in a criminal case, must limit its cross-examination of the defendant to those collateral matters as to which the defendant has been convicted for felony

or for misdemeanor involving moral turpitude (petition, pp. 37-39). The government completely fails to meet those cases, or that argument (Government's brief, pp. 18-20). It simply passes over them, *sub silentio*. Merely because a defendant takes the stand in a criminal case does not, under the unanimous Federal rule, subject him to any line of collateral attack which the government may level at him. Of course, every defendant who takes the stand wants to present himself in the best possible light before the jury. In the *Provo* case, the staff sergeant who testified in his own behalf undoubtedly wanted to picture himself as a good soldier who would not engage in conduct unbecoming a member of the armed forces. And presumably he did his best to appear in that role. When the government in the *Provo* case sought to demolish this good impression by asking the defendant on his cross-examination about his alleged homosexual abberrations—it could as well argue there that its inquiry was only for the purpose of impeaching the good impression the defendant sought to make on his direct examination. That, in substance is the gist of its argument here. But its single question about homosexuality, in the *Provo* case, despite the government's objective in asking it, was held to constitute reversible error. This holding was made, peculiarly enough, by the Second Circuit (*Provo* v. *United States*, 215 Fed. 2nd 531). It was in complete accord, however, with all the other circuits (petition, pp. 37-39). The same rationale, as that presently urged here, could have been advanced by the government in *Escheat* v. *United States*, 188 F. 2d 336 (8th Cir. 1951) as justification for its line of cross examination there. There, several defendants were convicted for a violation of the Mann (White Slave) Act.

At the trial one defendant had been cross-examined as to certain arrests and another as to previous marriages and divorces, all of which tended to destroy the good impressions which the defendants had sought to make on their direct examination. The Court of Appeals reversed the convictions, however, because of the impropriety, under the Federal rule, of the questions asked on cross-examination. We could analyze all the other cases cited in the petition on the point and they would all indicate that the sole purpose of the prosecutor in each case in asking the objectionable question on cross-examination was to try to destroy the favorable impression made by the defendant in his testimony on direct examination. All the cases hold the questions to be reversible error, and regardless of the government's alleged objective or purpose.

The only authority which the government in its brief cites as justification for the cross-examination in the instant case is the *Pagano* case (Government's brief, p. 20). Obliquely, it cites this court's denial of certiorari in the *Pagano* case as if, from that denial, some inference could be drawn that this court approved either the decision or the reasoning of the Second Circuit Court of Appeals in affirming Pagano's conviction. Surely, the Solicitor General of the United States knows, or should know, that no such inference of approval is warranted by the denial of certiorari.

With great positiveness this court has said that its denial of certiorari "does not remotely imply approval or disapproval of what was said by the Court of Appeals" (*Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 919, per Frankfurter, J.) Or, as it

was alternatively stated in the same case at the same page, "the denial of certiorari carries with it no implication whatever regarding the Court's views on the merits of a case which it declines to review". Indeed, the misconceptions of the effect of a denial of certiorari were so general, that this court has found it necessary to frequently reiterate the proposition that the denial of certiorari carries with it "no support of the decision" sought to be reviewed (*Agoston* v. *Pennsylvania,* 340 U. S. 844, 845.

In view of the foregoing decisions, we can say, with absolute certainty, that the denial of certiorari in the *Pagano* case, in no way implies, directly or indirectly, any approval by this court, of the reasoning or holding of the Second Circuit Court of Appeals in that case. The *Pagano* case must stand, therefore, as simply a holding of the Second Circuit Court of Appeals which is out of line with its own holding in the *Provo* case and with all the cases in the other circuits cited in the petition (pp. 37-39). In advancing the *Pagano* case as his sole authority justifying the cross-examination here, the Solicitor General is really engaging in some form of circular reasoning. In effect he is citing as authoritative in the court of last resort, a decision of an intermediate court in one case for another decision made by the same court in another. To put it another way, it is the equivalent of arguing in the Supreme Court that the Second Circuit Court of Appeals is right in the instant case because the Second Circuit Court of Appeals, in another case, said it was right. We think the Solicitor General might, more logically, have argued, that the decisions from all the other

circuits cited in the petition (pp. 37-39) were erroneously decided. But, he did not choose to do that. At all events, we submit that no adequate answer has been given to the point of the impropriety of the line of cross-examination which was allowed here.

Conclusion

This case is a proper case for granting certiorari because:

(a) It (the decision below) is out of line with *Jencks, Scales,* and *Lightfoot* on the issue of requiring the production and inspection of prior statements of government witnesses on the subject matter of their testimony. This single issue, *per se,* is of such great public interest that it presents a proper case for the allowance of certiorari. The *Jencks* decision has been the subject of wide discussion among the bench, bar, the press, the legislative and executive branches of the government and the public generally. As a result of it, Congress enacted the new Section 3500 of Title 18 of the U. S. Code, as added by Public Law 85-269, 85th Cong. 1st Sess. It was approved by the President on September 2, 1957. The new law enacts, as a matter of national legislation, the essence of this Court's decision in *Jencks;*

(b) The dearth, or complete lack of authority on the issue of whether the writing of such letters to a public agency as those here involved, constitute *grave* crimes under Federal law, poses an important Federal question of such general concern, that certiorari should be allowed in order that the question may, in the

public interest, be passed upon by the court of last resort;

(c) The decision by the Court of Appeals in this case on the issue of the permissible scope of cross-examination of a defendant in a criminal case is contrary to the decisions of all the other Federal circuits and for the sake of uniformity of Federal law, certiorari should be allowed so that the issue can be authoritatively resolved.

A case presenting three such important questions of Federal law is certainly an appropriate one in which to allow certiorari.

Respectfully submitted,

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